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YAP LEE SEE

v.

WILLIAM TAY & ORS

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HIGH COURT MALAYA, KUALA LUMPUR
YEOH WEE SIAM JC
[ORIGINATING SUMMONS NO: F-24-39-2010]
14 MAY 2010

C ***CIVIL PROCEDURE:*** *Affidavits - Jurat - Whether affidavits without translation jurat admissible*

FAMILY LAW: *Children - Custody - Custody and guardianship of an illegitimate child - Whether could be given to mother of child - Law relating to custody and control of illegitimate infants - Rights of a father of an illegitimate child - Rights of a natural mother of an illegitimate child - Civil Law Act 1956, s. 27*

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The plaintiff was the mother of a child named Kelly, aged five years and four months. The plaintiff and the first defendant had
E co-habited without getting married and Kelly was born out of wedlock. The first defendant was the son of the second and third defendants. The plaintiff claimed that she used to live with the defendants and during the day when she went to work, Kelly was taken care of by the second and third defendants. She took care of
F Kelly after work. In April 2009, the plaintiff quarrelled with the first defendant over his frequent acts of bringing home other women and she was chased out of the house. After being chased out, the defendants did not allow the plaintiff to see Kelly. As such, the plaintiff commenced this action seeking the custody, care and
G control ("custody") of Kelly and an order that the defendants return Kelly to her. The plaintiff averred that she worked as a clerk with a salary of RM1,200 per month. The plaintiff's mother was a housewife and could take care of Kelly when the plaintiff was working. The plaintiff also claimed that the first defendant worked
H in Sarawak and was always drunk at night. The High Court ordered that the custody of Kelly be given to the plaintiff and that the defendants return Kelly to the plaintiff. Hence this appeal by the defendants. Counsels submitted that the affidavits of the 3rd defendant and the plaintiff should not be admissible on the ground
I that there was no translation jurat.

Held (allowing the plaintiff's application):

(1) Pursuant to s. 27 of the Civil Law Act 1956, the law relating to the custody and control of illegitimate infants applicable in Peninsular Malaysia is still the same law as the one that was administered in England as at 7 April 1956, *ie*, English common law. (paras 11 & 12)

(2) A putative father has no rights over his illegitimate child. The natural mother of an illegitimate child has the right of custody, care and control over her illegitimate child unless she is proven to be a morally unfit mother. (para 20)

(3) The first defendant, even though he was the putative father, had no rights over Kelly, who was illegitimate, and should not be given custody of Kelly. Therefore, the second and third defendants did not have any right or claim whatsoever as putative grandparents although they contended that they had always been taking care of Kelly. (para 21)

(4) The affidavits of the 3rd defendant and the plaintiff were admissible in the absence of any sworn evidence that they could not understand Bahasa Malaysia. (para 29)

(5) The plaintiff was not unfit, whether morally or otherwise, to be appointed as a guardian of, and to be given custody rights over Kelly. It was for the welfare of Kelly who was only five years and four months old, and in her best interests, to be nurtured and cared for by her own natural mother, and not by the first defendant who was the putative father, but not the legal father. (para 30)

(6) Just because Kelly had been taken care of by the 2nd and 3rd defendants after the plaintiff left the house did not deprive the plaintiff of her legal right as the natural mother to the custody of her illegitimate child. The evidence showed that the plaintiff made several attempts to see her child but was prevented by the defendants to do so. (para 31)

(7) The plaintiff was given custody of Kelly with reasonable and supervised access to the first defendant. The access was to be supervised in view of the high probability that Kelly may not be returned to the plaintiff after access by the first defendant. (paras 32 & 33)

Case(s) referred to:
Chelsa Cabalona Abdullah v. Siek Ming Hua [2008] 8 CLJ 285 HC ***(refd)***
Koh Lai Kiow v. Low Nam Hui [2005] 3 CLJ 139 HC ***(refd)***
Lim Suk Fang (F) v. Lim Kim Heng [1993] 1 LNS 35 HC ***(refd)***
Re Adoption Application No: 41/61 [1962] 2 All ER 562 ***(refd)***
Re Balasingam & Paravathy, Infants; Kannamah v. Palani [1970] 1 LNS 134 HC ***(refd)***
Re M (an infant) [1952] 2 All ER 911 ***(refd)***
T v. O [1992] 1 LNS 45 HC ***(refd)***
Tam Ley Chian v. Seah Heng Lye [1993] 1 LNS 72 HC ***(refd)***
Tang Kong Meng v. Zainon Md Zain & Anor [1995] 4 CLJ 409 HC ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 27
Courts of Judicature Act 1964, s. 24(d)
Rules of the High Court 1980, O. 92 r. 4

Other source(s) referred to:
Halsbury's Laws of England, vol 24, para 548

For the plaintiff - G Nanda Goban; M/s Goban & Co
For the three defendants - ET Low; M/s Cheong Wai Meng & Van Buerle

Reported by Amutha Suppayah

JUDGMENT

Yeoh Wee Siam JC:

Appeal

[1] This is an appeal by William Tay ("the first defendant"), How Yoke Lian ("the second defendant") and Tay Ah Kiew ("the third defendant") against my decision made in Chambers on 22 April 2010 in respect of the originating summons filed by Yap Lee See ("the plaintiff") on 29 March 2010 ("the application") ("encl. 1").

Prayers In encl. 1

In encl. 1, the plaintiff prayed for the following orders:

1) The plaintiff be given the right of custody, care and control ("custody") of the child, Kelly Tay (Date of Birth: 15 December 2004) ("the child");

2) The first defendant and/or second defendant and/or third defendant return to the plaintiff her child;

3) The defendants be prohibited from removing the child from the custody of the plaintiff without the plaintiff's permission;

4) The first defendant be given reasonable access to the child, under supervision;

5) The defendants pay the plaintiff costs in the cause; and

6) Such other order or further relief as this Honourable Court deems fit, just and appropriate.

Backgrounds Facts

[2] The plaintiff is the mother of the child. The plaintiff and the first defendant co-habited without getting married. The child, a girl, was born out of wedlock on 15 December 2004. At the time when encl. 1 was decided by me, the child was about five years and four months old.

[3] The first defendant is the son of the second and third defendants. The third defendant is the husband of the second defendant.

[4] Enclosure 1 was first fixed for hearing before me in Chambers on 9 April 2010. On that day, the first and second defendants were absent but the third defendant was present. The third defendant informed the court that the first defendant was working in Sarawak and the second defendant had difficulty in walking, and had gone to see a doctor. He undertook to inform the first defendant of the matter. He also confirmed that the child was being taken care of by him and his wife ie, the second defendant.

[5] After considering the application of the plaintiff on 9 April 2010, I made an interim order that the custody of the child be given to the plaintiff. I also ordered that the three defendants return the child to the plaintiff forthwith (encl. 10).

[6] I then fixed encl. 1 for *inter partes* hearing on 22 April 2010 before making a final order on the matter.

A **Grounds Of Plaintiff's Application In encl. 1**

[7] Among other things, the plaintiff, in her affidavit in support of encl. 1, averred the following:

B (a) The plaintiff's relationship with the first defendant started in 2002. From June 2003 the plaintiff lived together with the first defendant, together with his parents, namely, the second and third defendants, at a rented house at 16, Jalan Cempaka 31, Taman Bakti Ampang, Selangor.

C (b) As a result of the intimate relationship between the plaintiff and the first defendant, the plaintiff gave birth to the child on 15 December 2004 at the Pantai Indah Hospital, Kuala Lumpur.

D (c) During the day when the plaintiff was working, the child was taken care of by the second and third defendants. The plaintiff took care of the child after her work.

(d) In April 2009, the plaintiff quarrelled with the first defendant's grandparents over her objection against the first defendant's E frequent acts of bringing home other women. The first defendant and his grandparents then chased the plaintiff out of their house at Taman Jaya.

(e) After being chased out, the plaintiff tried on numerous F occasions to see the child who was being taken care of by the second and third defendants at their house but was not allowed to do so by the three defendants. The plaintiff could only see the child standing behind the grill of the house whilst the plaintiff stood outside the gate.

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(f) The plaintiff averred that she should be given custody of the child for the following reasons:

(i) the plaintiff is the natural mother of the child and she has H the legal right to have custody of the child;

(ii) the plaintiff is physically and mentally able to take care of the child and she can support the child from her salary as a clerk;

(iii) the plaintiff's salary is RM1,200 per month;

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(iv) the plaintiff works from 9am to 5pm from Monday to Friday and has sufficient time after work and during the week-ends to take care of the child;

(v) the plaintiff's mother is a housewife and can take care of the child when the plaintiff is working;

(vi) the first defendant is working in Sarawak and the plaintiff believes that he is living with another woman. The first defendant is always drunk at night.

(vii) from the time the child was born, the first defendant did not contribute towards the care of the child and he was always working outstation as a sales person or coming home late after 10pm.

(viii) the second and third defendants are of ages 56 and 61 and the third defendant is not in good health. The second and third defendants make and distribute cakes for sale at the market and they are always busy doing that;

(ix) the second and third defendants were always moving house and changing addresses and this has a negative impact on the child's psychology and does not give the child a stable environment. The plaintiff believes that the second and third defendants are always changing their addresses to avoid their creditors;

(x) since the three defendants prevent the plaintiff from seeing the child, the plaintiff is worried that with time, the child would forget her and not know that the plaintiff is the child's natural mother.

The plaintiff lodged a Police report to state that she had been denied access to her child by the three defendants (see exh. YLS7).

The plaintiff made several efforts to see her child but was not allowed to do so by the three defendants (see paras. 13 to 20 of her affidavit in support).

The Law

[8] The plaintiff made the application under s. 24(d) of the Courts of Judicature Act 1964 ("the CJA") which provides as follows:

> 24. Without prejudice to the generality of section 23 the civil jurisdiction of the High Court shall include:

A (a)

(b)

(c)

B (d) jurisdiction to appoint and control guardians of infants and generally over the person and property of infants;

[9] The plaintiff also relied on O. 92 r. 4 of the Rules of the High Court 1980 which provides as follows:

C Inherent powers of the Court.

4. For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of
D the Court.

[10] From s. 24 of the CJA it is without doubt that the High Court is conferred with the jurisdiction, and has the power to hear any application for guardianship and custody of an infant, including
E an illegitimate child. However, the CJA does not provide the criteria or principles to guide the Court on how it should exercise its powers in s. 24 of the CJA.

[11] Guidance on this matter can be found in the Civil Law Act
F 1956 ("the CLA"). Section 27 of the CLA provides as follows:

In all cases relating to the custody and control of infants the law administered shall be the same as would have been administered in like cases in England at the date of the coming into force of this Act, regard being had to the religion and customs of the parties
G concerned, unless other provision is or shall be made by any written law.

[12] From s. 27 of the CLA, it is very clear that in this country, the law applicable to the custody and control of infants shall be the same as the law that would have been administered in like cases at
H the date of coming into force of the CLA, unless there is other provision made by any written law. Since the coming into force of the CLA in Peninsular Malaysia on 7 April 1956, and in Sabah and Sarawak on 1 April 1972, there is no provision made in any written law or statute, whether in England or in Malaysia, relating to the
I custody and control of illegitimate infants (see also *Re Balasingam & Paravathy, Infants; Kannamah v. Palani* [1970] 1 LNS 134). Therefore, the law relating to the custody and control of

illegitimate infants that is applicable now in Peninsular Malaysia, where this case is filed, is still the same law as the one that was administered in England as at 7 April 1956, namely English common law. A

[13] Under English common law, where a child is illegitimate, the natural mother is the guardian unless she is considered morally unfit (see *Bromley's Family Law* (8th edn), para 548 of *Halsbury's Laws of England*, vol. 24, *The Law of Guardianships* by Richard V. Mackay - Oceana Publications Inc, New York]; (see also *Lim Suk Fang (F) v. Lim Kim Heng* [1993] 1 LNS 35, High Court, Kota Kinabalu, Syed Ahmad Idid J's decision in OS No. K. 24-22-1993 dated 19 November 1993). B C

[14] In *Re M (an infant)* [1952] 2 All ER 911 the Court of Appeal held that the putative father of an illegitimate child was not a "parent". D

[15] Diplock LJ in *Re Adoption Application No: 41/61* [1962] 2 All ER at p. 562 stated as follows:

> ... it was clear policy ... the Court shall have no regard to the interest of the putative father of an illegitimate child. E

[16] In *Tam Ley Chian v. Seah Heng Lye* [1993] 3 MLJ 696; [1993] 1 LNS 72, Selventhiranathan JC (as he then was) at p. 700 stated:

> However, where a child is illegitimate, the putative father has no rights over him under the common law. As Sir George Baker P commentated in *Paton v. British Pregnancy Advisory Service Trustee & Anor* [1978] 3 WLR 687; [1979] QB 276; [1978] 2 All ER 987, at page 690: F
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> > ... I would say a word about illegitimate, usually called putative, but I prefer myself to refer to the illegitimate father. Although American decisions to which I have been referred concern illegitimate fathers, and statutory provisions about them, it seems to me that in this country the illegitimate father can have no rights whatsoever except those given to him by statute. That was clearly the common law. G H

[17] James Fung J (as he then was) in *Tang Kong Meng v. Zainon Md Zain & Anor* [1995] 4 CLJ 409, among other things, stated:

> There is never a dispute in this case that Alvina is an illegitimate child of Madam Chong and Tang. Being an illegitimate child, even Encik Karpal Singh has candidly admitted that the putative father has no legal right over the child under civil law, and the natural I

A mother has the obligation not only to maintain the child, but is also entitled to exclusive care. (See the case of *R v. Brighton (Inhabitants)* [1861] 1 B&S 447; *Homer v. Homer* [1979] 1 Hag. Con, 337 which were accepted in our Malaysian Courts in *T v. O* [1992] 1 LNS 45; [1993] 1 MLJ 168 and *Tam Ley Chian v. Seah Heng Lye* [1993] 1 LNS 72).

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[18] Shankar J in *T v. O (supra)*, which was referred to in *Koh Lai Kiow v. Low Nam Hui* [2005] 3 CLJ 139 stated in very clear terms the following:

C Under English common law, a father of an illegitimate child had no rights over the child merely by virtue of his paternity.

(See also *Chelsa Cabalona Abdullah v. Siek Ming Hua* [2008] 8 CLJ 285.)

D **[19]** According to *The Concise Oxford Dictionary* (9th edn), "putative" means "reputed" or "supposed". Thus, a putative father is only a reputed or supposed father, and not a legal father.

[20] From the abundance of authorities cited above, it is clear E that, currently, the law in Malaysia regarding illegitimate children is that which is based on English common law which unequivocably declares that a putative father has no rights over his illegitimate child. The natural mother of an illegitimate child has the right of custody, care and control over her illegitimate child unless she is F proven to be a morally unfit mother.

Court's Decision

[21] Based on the law, therefore, in this case the first defendant, even though he is the putative father, he has no rights over the G child, who is illegitimate, and should not be given custody of the child. It automatically follows that the second and third defendants, even though they are parents of the first defendant, do not have any right or claim whatsoever, as putative grandparents of the child even though they contended that they had always been taking care of the H child when the first defendant and / or the plaintiff were working.

[22] I also considered the welfare of the child to be of paramount importance. The child is certainly too young and will not know what is best for her welfare and interest, both short and long term, I and that is the reason why I did not interview the child as suggested by learned counsel for the three defendants.

[23] The first defendant averred that the plaintiff was never interested in the child from the time the child was born. He claimed that he was the one who took care of the child after his work, and that at night it was he, and not the plaintiff, who gave the child her milk and changed the child's pampers.

[24] The first defendant also averred that before the plaintiff left the house, she was working at a cafe on each night from 8pm until 2am and she would often be brought home by different men. He stated that this caused disputes between him and the plaintiff. He further stated that the plaintiff did not come back at all to take care of the child.

[25] I find that the above allegations of the first defendant against the plaintiff not supported by concrete evidence. There is no cogent proof that the plaintiff is morally unfit to be given custody of the child other than the averments of the first defendant. At the time when the plaintiff made this application she was no longer working at the cafe. She was working as a clerk with a salary of RM1,200 per month. At the time when I first heard the application on 9 April 2010, the plaintiff is still living and working in Kuala Lumpur.

[26] On the other hand, the first defendant was working in Sarawak. His father, the third defendant, informed the court on 9 April 2010 that the first defendant would send him money from Sarawak for the child. On the second date of hearing on 22 April 2010, the first defendant had just left his job in Sarawak, probably because of this case, and is back in Kuala Lumpur looking for a job. All this shows that prior to 22 April 2010 the first defendant was not the one who was taking care of the child. He was merely relying on his parents, the second and third defendants, and even his sister, to take care of the child. Apart from not having any rights as a putative father over the illegitimate child, the first defendant was clearly not able to live with and to physically take care of the child.

[27] From the plaintiff's two affidavits, it is shown that she made several efforts to visit the child but was not allowed to do so by the three defendants. The plaintiff also averred that her mother, who is a housewife, is able to help her take care of the child when the plaintiff is working. The first defendant averred that the plaintiff's mother is a manual worker and therefore unable to take care of the child, but here again, such averment is not corroborated by any evidence.

[28] The plaintiff averred that the first defendant was always drunk and used to bring home his girl friends. She also alleged that the first defendant is living with another woman in Sarawak. Here, I am also of the view that these averments of the plaintiff are not supported by any concrete evidence.

[29] As for the respective submissions of both learned counsels that the affidavits of the 3rd defendant and the plaintiff, as the case may be, should not be admissible on the ground that there is no translation jurat, I allowed such affidavits to be adduced in the absence of any sworn evidence that the 3rd defendant or the plaintiff cannot understand Bahasa Malaysia.

[30] Going by the affidavits filed by both parties, I am not convinced that the plaintiff is unfit, whether morally or otherwise, to be appointed as a guardian of, and to be given custody rights over, the child. As compared to the first defendant who is now without a job, the plaintiff should be able to support the child, with the help of her parents, even though she is only earning RM1,200 per month. I am of the strong belief that it is for the welfare of this little girl, who is only five years and four months old, and in her best interests, to be nurtured and cared for by her own natural mother, and not by the first defendant who is the putative father, but not the legal father, of the child.

[31] Just because the child had been taken care of by the 2nd and 3rd defendants after the plaintiff left the house, either in April 2008 or 2009 (this fact is disputed), it does not deprive the plaintiff of her legal right as the natural mother to the custody of her illegitimate child. The evidence shows that the plaintiff made several attempts to see her child but was prevented by the three defendants to do so. This does not prove that she is an unfit mother. On the contrary, it shows the plaintiff's continuing love and concern for the child.

[32] In applying the English common law to this case, I decided that the plaintiff should be given custody of this illegitimate child, but with reasonable and supervised access to be given to the first defendant.

[33] I am of the opinion that access should be supervised in this case in view of the high probability that the child may not be returned to the plaintiff after access by the first defendant. As can be seen from the record of proceedings, before this, the plaintiff had at all times been prevented from having access to the child by the

three defendants. After the interim order was given by the court on 9 April 2010, the three defendants, in particular the third defendant, did not comply with the order, and did not hand over the child on the same day even though ordered to do so by the court. It was only after the court made the final order on custody on 22 April 2010, that the child be handed over to the plaintiff, outside the chambers of the judge, and upon stern warning being given by the court of possible action being taken for contempt of court in case of non-compliance with the order, that the three defendants complied with the order.

[34] I allowed the plaintiff's application in encl. 1, and ordered accordingly.